Judicial Filibusters – Not A Senate Tradition

Speech given on Senate Floor By Senator Orrin G. Hatch

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Madam President, the crisis created by the unprecedented use of filibusters to defeat judicial nominations must be solved while preserving two important Senate traditions. On the one hand, extended debate is an important part of how the United States Senate conducts its legislative business. On the other hand, we have traditionally given judicial nominations reaching the Senate floor a final confirmation decision. Two years ago, this latter tradition was attacked when the filibuster was used for the first time to defeat majority supported judicial nominations. Mr. President, these are two different and important traditions and each must be preserved.

Solving this crisis by restoring Senate tradition is not a partisan step, but is in the interest of the Senate as an institution. Both Republicans and Democrats should follow the same standard, no matter which party occupies the White House or runs the Senate. Neither Democrats nor Republicans should have to go through this vicious cycle of filibusters against qualified judicial nominees.

Let me first clarify once again the situation in which we find ourselves. Before 2003, no majority supported judicial nomination had been defeated by a filibuster. Under our Rule XXII, we did vote on motions to end debate on judicial nominations, though we did so just 15 times in 35 years. Simply taking a cloture vote, however, does not mean a filibuster is underway. In fact, some of those cloture votes were used deliberately to prevent filibusters, clearing the procedural path and guaranteeing an up or down confirmation vote. Some have been used for floor management purposes. We did so even on very controversial nominations, such as President Clinton's choices of Richard Paez and Marsha Berzon for the U.S. Court of Appeals for the Ninth Circuit.

Before 2003, only one judicial nomination on which cloture was not invoked was not confirmed. Opposition to cloture on the controversial 1968 nomination of Abe Fortas to be Chief Justice was evenly bipartisan and showed that the nominee lacked clear majority support. At the nominee's request, President Lyndon Johnson withdrew the nomination the next day. Senator Robert Griffin, from Michigan, who led opposition to the nomination, personally told me that there never was an intention to use the filibuster to defeat the Fortas nomination. There was no need, since the votes were there to defeat the nomination outright. Lyndon Johnson knew it and that is why they withdrew the nomination rather than be embarrassed by the bipartisan vote of both parties against the nominee.

Before 2003, if the Senate rejected a judicial nomination that reached the Senate floor, we did so by voting it down; filibusters did not prevent a final vote in order to keep a nomination from confirmation. The break with that tradition came in 2003. During the 108th Congress alone, we voted on motions to end debate on judicial nominations 20

times. Each vote failed, and opposition to cloture was completely partisan. None of those nominees was confirmed, though each had clear bipartisan majority support.

Those who want to end this Senate tradition of giving judicial nominations reaching the Senate floor an up or down vote fear they will lose if we follow that tradition. To them, the end of defeating President Bush's judicial nominations justifies the means of destroying Senate tradition. Being honest about it would reveal how such partisan strategies are politicizing the judicial appointment process, so they try to make other arguments.

They claim Republicans filibustered President Clinton's judicial nominations, but each of his judicial nominees on whom we took a cloture vote is today a sitting Federal judge.

They claim they don't filibuster very often, which is beside the point if using the filibuster against judicial nominations violates constitutional principles and departs from Senate tradition. There have already been enough judicial nomination filibusters to give President Bush the lowest appeals court confirmation rate of any president since Franklin Roosevelt.

Or they claim they filibuster only nominees who are out of some kind of mainstream. It is difficult to know what that charge really means, especially since the American Bar Association--which Democrats once considered the gold standard--has found them qualified. Senators may, of course, vote against a judicial nominee for any reason they wish, but we should stop pretending that out of the mainstream is anything more than a prediction that the nominee may not always rule the way liberal interest groups want. Considering the stream in which many of those groups swim, I'm not so sure this isn't a compliment. If the mainstream really mattered, though, these filibusters would never have started. Newspaper editorials opposing filibusters of judicial nominations outnumber those supporting them by at least six-to-one.

Madam President, I ask unanimous consent that some representative editorials from mainstream newspapers be printed in the **RECORD**.

There being no objection, the material was ordered to be printed in the **RECORD**, as follows: (See RECORD for these editorials)

Mr. HATCH. These may be their reasons, but there are no excuses. At the mere suggestion of abandoning the Senate's tradition regarding judicial nominations when President Clinton was in office, former Democratic Leader Tom Daschle said, ``I find it simply baffling that a Senator would vote against even voting on a judicial nomination."

That should be our response today as Senators on both sides of the floor.

Last week here on the Senate floor, the distinguished Senator from West Virginia made his case against returning to Senate tradition regarding judicial nominations. I respect him. I have a lot of regard for him, but I have to confess I was surprised that someone

with such knowledge of the traditions and rules of this body would appear so willing to abandon tradition.

He equated the filibuster with the Senate itself. He equated filibustering judicial nominations with filibustering legislation and concluded that returning to our tradition regarding judicial nominations would be an attack on the Senate somehow. I would like to address each of these elements because I do not believe they can withstand fair scrutiny.

First, my friend from West Virginia argued that the Senate was designed from its very inception as a place of absolutely unfettered and completely unlimited debate. As such, he argues, any limitation of debate strikes at the very heart of the institution itself. Yet in the second volume of his own history of the Senate, he writes on page 115:

It is apparent that the Senate in the First Congress disapproved of unlimited debate.

The original rule IV prohibiting a Senator from speaking more than twice in any one debate on the same day without leave of the Senate remains in only slightly modified form as our rule XIX today. Even more significantly, rule VIII in the first Senate provided for a majority to proceed to a vote by calling the previous question.

Coupled with the Founders' expressed commitment to majority rule, these facts demonstrate that even with regard to legislation, the possibility of preventing final action through extended debate was not created by original design. It arose by default through dropping that previous question rule in 1806.

It would still be decades before Senators who sought to protect the institution of slavery would discover they could use this procedural loophole to their advantage and, of course, the filibuster was born. Its twin, however, was a parallel and ongoing effort at filibuster reform by which we have actively sought properly to balance the minority's right to debate and the majority's right to decide. The solution we seek today is part of that ongoing effort.

The Senator from West Virginia next equated filibusters of judicial nominations with filibusters of legislation. His policy arguments in favor of the filibuster, however, apply only to the legislative process. He said, for example, that without the filibuster ``there exists no leverage with which to bargain for the offering of an amendment. All force to effect compromise between the parties will be lost."

I note that in previous debates about filibuster reform, such as in 1975, Democrats, such as the senior Senator from Massachusetts, Mr. *Kennedy*, offered this very same argument against the filibuster. Still, this notion obviously applies where the Senate either fashions or effects legislation, but it is irrelevant to nominations.

The Senator from West Virginia has long been this Chamber's leading expert on our history and procedure. For that I compliment him. For this reason, though, I was

disappointed that he would fail to make such an important distinction between legislative and judicial nomination filibusters, a distinction based on both historical fact and constitutional principle. In other words, there is a difference between the legislative calendar and the executive calendar in the Senate.

The Senator from West Virginia is not the first in the debate over these new judicial nomination filibusters failing to make this critical distinction. Other Democratic Senators, for example, want to use the cup-and-saucer analogy by which George Washington allegedly described pouring hot action from the House cup to cool in the deliberation of the Senate saucer.

As Jeffrey Toobin's recent analysis in the New Yorker magazine points out, however, not only is this story probably apocryphal, but the supposed exchange between Washington and Jefferson specifically focused on, you got it, legislation. In fact, that is the only context in which it makes any sense. If they said it at all, they were talking about the relationship between the two Houses within the legislative branch, not the relationship between the legislative and executive branches.

The distinction between legislative and judicial filibusters is a matter of historical fact. Every example offered last week by my friend from West Virginia involved legislation. He opened and closed his speech by evoking scenes from the classic film ``Mr. Smith Goes to Washington.'' I went back and checked the script. Senator Jefferson Smith in that movie, played by the great Jimmy Stewart, filibustered an appropriations bill. That is legislation.

The example the Senator from West Virginia said was most relevant--President Franklin Roosevelt's proposal to reorganize the judiciary--was also, you got it, legislation. That example is actually not relevant at all, however, because that 1937 legislation was not defeated by a filibuster. The most definitive study of President Roosevelt's plan by Mary McKenna concludes that it did not have majority support in the Senate at all. There was no need for a filibuster. Rather than the majority being stymied in its attempt to pass the bill, the majority--and an overwhelming majority at that--sent it back to committee.

To my knowledge, no Senators are today calling for an end to the legislative filibuster as a group of Democratic Senators did a decade ago. Nine of them, led by the Senator from Iowa, **TOM HARKIN**, and the Senator from Connecticut, **JOSEPH LIEBERMAN**, serve in this body today. They argued back then that all filibusters, including those of legislation, unconstitutionally infringe on majority rule. The two Senators from Massachusetts, **EDWARD KENNEDY** and **JOHN KERRY**, along with the Senator from California, **BARBARA BOXER**, the Senator from New Jersey, **FRANK LAUTENBERG**, the Senator from Maryland, **PAUL SARBANES**, the Senator from New Mexico, **JEFF BINGAMAN**, and the Senator from Wisconsin, **RUSS FEINGOLD**, voted against tabling that proposal.

I find it simply baffling that Senators who once supported abolishing the Senate tradition of legislative filibusters would today support establishing a tradition of judicial nomination filibusters--in other words, filibusters of nominees by the President on the executive calendar, not the legislative calendar.

Ignoring the distinction between legislative and judicial nomination filibusters is necessary for the argument of the Senator from West Virginia, as evidenced when he asked:

If we restrain debate on judges today, what will be next?

Yet for more than a century, filibusters of legislation coexisted nicely with our tradition of giving up-or-down votes to judicial nominations that reach the Senate floor.

Our experience under the current version of rule XXII shows that these two traditions can peacefully coexist. That rule, by the way, was born in 1917 after a filibuster of legislation. We have had the current version of rule XXII since 1975. From 1975 to 2002, the 94th Congress through the 107th Congress, only 3 percent of cloture votes were judicial nominations; 85 percent of those cloture votes passed, and all nominations subject to cloture votes were confirmed.

During the 108th Congress, 49 percent of cloture votes were on traditional nominations. None of them passed, and none of the nominations were confirmed.

I must say, with all due respect to my dear friend from West Virginia, that using the filibuster to defeat majority-supported judicial nominations has not been part of even modern Senate practice, let alone historic Senate tradition.

Let me repeat that. Using the filibuster to defeat majority-supported judicial nominations has not been part of even modern Senate practice, let alone historic Senate tradition.

In his op-ed piece in the Washington Post last week, the Senator from West Virginia ignored our tradition regarding judicial nominations in another way. He argued that by preventing a confirmation vote through a filibuster, the Senate had formally rejected these judicial nominations. How can it be a rejection of judicial nominations when a majority of Senators supports confirmation of each one of those people? Each nominee on whom cloture was not invoked remained on the Senate's executive calendar. Our own rule XXXI states that nominations that are ``neither confirmed nor rejected'' shall be returned to the President. Each of those filibustered nominations was, indeed, returned to the President when the 108th Congress adjourned. By definition, common sense, and our own rules, that means they were not rejected. My friend from West Virginia cannot on the one hand claim these nominations were rejected but on the other hand claim that these filibusters are about deliberation and debate.

Legislative and judicial nomination filibusters are different as a matter of historical fact because they are different as a matter of constitutional principle. Legislation belongs to the legislative branch under article I of our Constitution, while nomination and appointment belong to the President under article II. In Federalist No. 65, Alexander Hamilton wrote that the President would be the ``principal agent'' in appointments. The Senate has an important role of advice and consent that checks the President's appointment power, but we do not control the executive process any more than the President controls the legislative process. We recognize the difference between legislative and executive business when we leave legislative session and proceed to executive session to address nominations we have placed on the executive calendar. My friend from West Virginia, I think, ignored those differences.

Interacting with the executive branch is simply not the same as interacting within the legislative branch. And thus it would seem almost self-evident that procedures we use regarding our authority over legislation might not be appropriate when we affect the President's authority over appointments. We must preserve our tradition that recognizes this constitutional distinction between the executive and legislative branches, between our role of advice and consent on judicial appointments, and our authority over legislation.

The Senator from West Virginia, in my opinion, used an unfortunate analogy in attacking those who would return the Senate to its confirmation tradition regarding judicial nominations. Others, such as the Anti-Defamation League, have strongly objected to his reference to Hitler's Nazi regime for various reasons. My point here is not that. It is different. I object to his claim that returning to our tradition regarding judicial nominations would be an example of ``how men with motives and a majority can manipulate law to cruel and unjust ends.'' There is nothing cruel or unjust about the Senate returning to our traditional advice and consent role regarding judicial nominations.

The Constitution gives the Senate the authority to determine our procedural rules. It was pursuant to that authority that the Senate dropped the previous question rule in 1806, adopted a cloture rule in 1917, and amended that rule several times since.

It was also pursuant to that authority that the Senator from West Virginia aggressively used various strategies to change Senate procedures when he served as majority leader of this body. This includes approaches currently under discussion, such as seeking a ruling from the Senate's Presiding Officer. Though the Senator from West Virginia last week said such an approach would abandon the ``cloak of legality,'' it would simply be following a procedural path that he himself blazed. I was here for part of that.

The Senator from West Virginia said this approach ``seeks to alter the rules by sidestepping the rules, thus making the impermissible the rule.''

Yet the Senate operates on the basis of parliamentary precedents and traditions, as well as by our standing rules, a history my friend from West Virginia helped shape and has been recognized as helping shape those rules.

In 1977, for example, the Senator from West Virginia made a point of order that once cloture has been invoked, the Presiding Officer must rule dilatory amendments out of order. One Senator criticized this strategy as trying to change Senate rules by majority vote during the heat of the debate. That criticism sounds an awful lot like the criticism the Senator from West Virginia leveled last week against those who might take the same approach today. Nonetheless, the strategy succeeded when the full Senate tabled an appeal of the Presiding Officer's ruling in favor of the distinguished Senator from West Virginia.

In 1979, the Senator from West Virginia introduced Senate Resolution 9 to make various changes to rule XXII. He argued that notwithstanding rule XXII's cloture requirement for rules changes, a simple majority could change Senate rules at the beginning of a new Congress. He was right. The current Senate, he argued, is not bound by the dead hand of the past Senate. He threatened that if the Senate did not come to a time agreement for considering his resolution, he would attempt to proceed by seeking a parliamentary ruling.

Also in 1979, the Senator from West Virginia made a point of order that the Presiding Officer, rather than the Senate, as required under our rule XVI, ruled nongermane certain amendments to appropriations bills.

As in 1977, that strategy worked when the Senate tabled an appeal of the Presiding Officer's ruling in favor of the Senator from West Virginia. In 1980, the Senator from West Virginia also secured a helpful parliamentary precedent but from a different procedural direction. He wanted to achieve confirmation for an individual nominee on the Executive calendar.

At that time, while a motion to go into executive session was not debatable, a subsequent motion to proceed to a specific item on the Executive calendar was debatable. On March 5, 1980, the Senator from West Virginia made a single motion for the Senate both to go into executive session and to proceed to a specific nomination. When the Presiding Officer sustained a point of order against this motion, one Senator criticized this attempt to change procedure by majority vote. Nonetheless, the Senator from West Virginia appealed the Presiding Officer's ruling, which was his right to do, and the Senate overturned, supporting the distinguished Senator's majority rule change.

This strategy might be described by some, using the Senator from West Virginia's words last week, as altering the rules by sidestepping the rules. It certainly limited what he now insists would be unfettered and unlimited debate.

In 1987, the Senator from West Virginia secured a parliamentary precedent that obviously dilatory requests by Senators to be excused during a rollcall vote were out of order. This applied the same strategy he had used in 1977, getting the Presiding Officer to rule dilatory tactics out of order, in a new context. Each of these examples has similarities and differences with the current situation.

I offer this detail only to demonstrate that Senate procedures have been changed through parliamentary rulings as well as by formal amendments to the rules themselves. As my friend from West Virginia has demonstrated by pursuing each of these strategies himself, the Senate can exercise its constitutional authority to determine its procedural rules either way.

He may certainly believe that the changes he sought were warranted while the change we may seek today is not. That is his right, and he can express that right in debate by voting against such a change. But that difference of opinion does not make his attempts to limit debate, even on legislation, right and just while any attempt to do so today on judicial nominations cruel and unjust.

We departed from our tradition of giving judicial nominations reaching the Senate floor an up-or-down vote only 2 years ago. The result has been the Senate's inability to do its constitutional duty of providing advice and consent regarding judicial nominations. We were able to give advice, I presume, but with regard to these 10 nominees we were never able to give consent or not consent, whichever the case may be. And that is done by a vote up and down. It demonstrates that the confirmation process is, in the words of the Washington Post, ``steadily degrading.''

Returning to that tradition of giving up-or-down votes for judicial nominations will not in the long run mean either party will always get its way. Both the executive branch and the Senate do change partisan hands from time to time. This standard, this tradition, knows no party and guarantees no partisan advantage. It applies no matter which party occupies the White House or which party controls

the Senate. It would bind Republicans as well as Democrats and preserve our institutional traditions. I hope and believe, however, that restoring this tradition will, despite some Senators' threats to blow up the Senate, help restore some comity and good will to this body.

Returning to that tradition, which recognizes the difference between our authority over legislation and the President's authority over appointments, is not an attack on the Senate; rather, it affirms our traditions and the Senate's unique place in our system of separated powers. Returning to it both respects the President's authority over appointments and asserts the Senate's role of advice and consent, not just advice but consent as well.

A majority of Senators have been deprived of the right to give or not give consent by these irresponsible filibusters of judicial nominations on the Executive calendar. The deviation we have seen from that tradition, wherein a filibuster prevents confirmation of nominees with majority support, undermines the President's authority and distorts the Senate's role. Preserving both of our traditions--extended debate regarding legislation and up-or-down votes on judicial nominations reaching the Senate floor--will restore the proper balance.

There is nobody in this body who respects the distinguished Senator from West Virginia more than I do. I hope we can resolve these matters so both parties are bound by the correct tradition that we are not going to filibuster executive branch nominees and we will both preserve the right to filibuster over the matters we totally control on the legislative calendar. I would fight to my death to preserve rule XXII on legislation because I have also been in the minority from time to time, and it was the only way we could stop some things which would have been just terrible for this country. But there is a difference between the legislative calendar and the Executive calendar.

I respect my colleague from West Virginia. I can truthfully say I love him because he has been a strong force around here for years, but I hope he will look at some of these examples I have given and some of these thoughts I have and help us stop this impasse that is occurring in the Senate, not by preferring one party over the other but by binding both parties to treat Presidential nominations with the respect they deserve.

I have to say I never quite concentrated on this enough until these judicial nominations were filibustered in 2003 and 2004. I myself am to blame for not having thoroughly studied this until these problems arose, but I have now studied it. I believe it would be far better for our Senate to get rid of these animosities and threats to have nuclear warfare and bind both the Republicans and the Democrats in the Senate to do what is right, to give a vote up or down, so that we can not only give advise but consent as well.

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